Supreme Court, U.S.
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NO. 02-1342

In The

Supreme Court of the United States

MARK A. ADAMS,

Petitioner,

v.

CITY OF AUBURN,

Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether no cause of action for interference with visitation rights by an ex-spouse exists under 42 U. S. C. § 1983 where it was Adams' ex-wife, not the police officers of the City of Auburn, who refused to turn over Adams' son, and where Adams did not allege any interference, policy of discriminatory non-interference, or other unconstitutional acts or omissions on the part of the City of Auburn.

PARTIES TO THE PROCEEDING

Petitioner is Mark A. Adams.

Respondent is City of Auburn, Indiana.

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STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner Mark A. Adams filed his Petition for Writ Certiorari following the entry of summary judgment in the United States District Court, Northern District of Indiana, on October 18, 2001. The Seventh Circuit Court of Appeals affirmed the District Court's summary judgment by Order of March 25, 2002. On April 24, 2002, the United States Court of Appeals for the Seventh Circuit denied Adams' Petition for Rehearing and Petition for Rehearing Enbanc.

STATEMENT OF THE CASE

The Plaintiff, Mark Adams, brought this action against the City of Auburn for the failure of the City of Auburn Police Department to enforce a visitation order. Adams alleged that on September 23, 2000 his ex-wife refused his visitation rights with his son for Adams' birthday because Adams' actual birthday was the next day. The custody agreement between Adams and his ex-wife allows visitation on family occasions such as funerals or weddings of close family members to take precedence over the visitation guidelines. Adams called the City of Auburn Police Department, but the police officers refused to enforce the visitation order because birthdays are not specifically listed in the custody agreement.

The following Tuesday, Adams' ex-wife refused to let him have visitation with his son because he did not give her twenty-four hours notice, even though their agreement does not require twenty-four hours notice. Adams again called the City of Auburn's Police Department which refused to enforce the visitation order.

The next day, Adams, once again, went to pick up his son for visitation. This time, Adams' ex-wife refused to let him have visitation with his son because he said that he would take his son to daycare that morning. Again, Adams called the City of Auburn Police Department and was told that the visitation order would only be enforced if he agreed to bring his son back that night.

Adams filed suit and alleged that the Police Department of the City of Auburn refused to do their duty when they refused to enforce a Court order. Adams further alleged that the Auburn Police Department failed to uphold the law when it refused to enforce the visitation decree. Adams sought damages pursuant to 42 U.S.C. § 1983.

The United States District Court, Northern District of Indiana, in ruling on City of Auburn's Motion for Summary Judgment, correctly distilled Adams' Complaint to the contention that City of Auburn is liable because its police officers were "negligent in their failure to enforce a visitation court order" or because they refused to enforce the decree, they otherwise failed "to do their duty". The District Court found that no facts rose to the level of a constitutional deprivation and that Adams had an adequate State Court remedy and did not have any requisite federal substantive basis for a Section 1983 lawsuit. The District Court further held that Adams had not alleged any facts to even remotely suggest that the City of Auburn police officers were acting pursuant to a municipal policy or custom.

The United States Court of Appeals for the Seventh Circuit affirmed. The Seventh

Circuit Court held that Adams did not allege official interference with his visitation rights by the police officers, and held that non-discriminatory inaction by the City and its police force does not afford a basis for relief under Section 1983.

REASONS FOR DENYING THE WRIT

I.

The Seventh Circuit Court Correctly Affirmed Summary Judgment Because No Cause of Action For Interference With Visitation Rights Exists Under 42 U.S.C. Section 1983 And Adams Has An Adequate State Law Remedy.

To state a claim for relief under § 1983, a plaintiff must demonstrate that he was deprived of a right secured by the Constitution or laws of the United States and that any such deprivation was achieved under color of law. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1975). Section 1983 does not, standing alone, create any equal or civil rights of citizens; rather, it provides a remedy for rights guaranteed by the Constitution or laws of the United States. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 905, 60 L.Ed.2d 508 (1979).

Adams filed his claim alleging that the City of Auburn is liable for damages to him under § 1983 for interference with his visitation rights. However, as noted by the courts below, no such cause of action exists. Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981).

In Wise, the plaintiff's wife was given custody rights to the plaintiff's daughter. The plaintiff took his daughter for an extended visit following an oral agreement with his ex-wife. While their daughter was with the plaintiff, the plaintiff's ex-wife telephoned and told the plaintiff that she wanted their daughter back that night. The plaintiff refused. Thereafter, the plaintiff's ex-wife called the police, who arrived at the plaintiff's apartment and took the daughter back to the plaintiff's ex-wife.

The Wise plaintiff filed suit against the police officers claiming damages pursuant to 42 U.S.C. § 1983 for interference with his visitation rights. The court stated that numerous federal decisions have, in the Fourteenth Amendment context, recognized that the relationship between parent and child is constitutionally protected. Wise, 666 F.2d at 1331. Furthermore, the court stated that these federal decisions, to be sure, recognize the important, fundamental interests involved. Wise, 666 F.2d at 1332. However, the court held that there is no substantive federal constitutional, statutory or common law governing family

relationships, including matters of custody and visitation rights between parents and children.

Accordingly, the Wise court found that the plaintiff had failed to allege or demonstrate that he had suffered any cognizable due process of law protection guaranteed him by the Fourteenth Amendment. Wise, 666 F.2d at 1333. The Wise court held that there was no § 1983 deprivation and further stated that § 1983 should not be viewed as a vehicle to resolve a dispute involving visitation rights - privileges. Wise, 666 F.2d at 1333. According to the Wise court, such a dispute is a subject uniquely reserved to the state court system; any claim for relief that the Wise plaintiff may have had existed under Colorado law and in the Colorado state system. Wise, 666 F.2d at 1333.

In Indiana, the ordinary method of enforcing visitation privileges is by means of contempt proceedings. Clark v. Clark, 404 N.E.2d 23, 37 (Ind. Ct. App. 1980). If there is an order or decree commanding an individual either to do or to refrain from doing something, that person can be punished for being in contempt of the court's order. Clark, 404 N.E.2d at 37. See generally, Piercey v. Piercey, 727 N.E.2d 26 (Ind. Ct. App. 2000); Williamson v. Creamer, 722 N.E.2d 863 (Ind. Ct. App. 2000); Hartzell v. Norman T.L., 620 N.E.2d 1292 (Ind. Ct. App. 1994). The court's power to arrest for contempt is not to be considered as a method of punishment, but as merely a means of securing compliance with its own order. Clark, 404 N.E.2d at 38. As in Wise, Adams' appropriate course of action was to file a contempt citation with the Court which entered the visitation order and ask that Court to find his ex-wife in contempt of that Court's visitation order.

Judge Cosbey correctly found below that Adams' liberty interest in visitation is not absolute and that Adams clearly had an adequate state law remedy for his ex-wife's interference with visitation rights. Adams is asking the Court to resolve a visitation dispute with his ex-wife via his § 1983 claim. As was held in Wise, such a claim is a subject uniquely reserved to the Indiana court system. Adams did not suffer a § 1983 deprivation.

II.

Adams' Claim Is Based Solely On A *Respondeat Superior* Theory And There Are No Allegations Of Any Municipal Policy Or Custom That Caused A Constitutional Deprivation.

1. A constitutional violation must have occurred for a governmental entity to be liable under § 1983.

Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or

executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The critical inquiry on the question of whether the City of Auburn is liable to Adams under § 1983 is whether a constitutional deprivation occurred. The case law has identified three instances in which a municipality can be said to have violated the civil rights of a person because of its policy:

> "1) an express policy that, when enforced, *causes a constitutional deprivation*,
> 2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a customary usage with the force of law, or
> 3) an allegation that the *constitutional injury* was caused by a person with final policy making authority." Baxter v. Vigo County School Corp., 26 F.3d 728, 734 (7th Cir. 1994). (Emphasis added.)

Clearly, in order for the City of Auburn to be liable to Adams under § 1983, a constitutional violation must have occurred. Monell, 436 U.S. at 690; Baxter, 26 F.3d at 734.

2. No constitutional violation has occurred in this matter.

As was discussed in Wise, *supra*, § 1983 is not a proper vehicle to resolve a dispute involving visitation rights - privileges. Wise, 666 F.2d at 1333. The District Court here correctly held that there is no substantive federal constitutional, statutory or common law governing family relationships, including matters of custody and visitation rights between parents and children. Wise, 666 F.2d at 1332. As was the case in Wise, Adams has not had his constitutional rights violated. Note that Adams did not sue the police officers who responded to his telephone calls, and, accordingly, Adams could only recover from the City of Auburn for a constitutional violation due to a policy or custom. A municipality cannot be held liable under § 1983 on a *respondeat superior* theory. Monell, 436 U.S. at 691. See also, Baxter, 26 F.3d at 734 (*respondeat superior* liability on the part of a local governmental unit is barred). Municipalities are answerable only for their own decisions and policies; they are not vicariously liable for the constitutional torts of their agents. Eversole v. Steele, 59 F.3d 710, 715 (7th Cir. 1995). Accordingly, the district court properly found that the City of auburn could not be held liable for the actions of its police officers under a theory of *respondeat superior*.

As noted by the court below, Adams has not even alleged that any policy or custom

was at work on the part of the City of Auburn to cause an alleged deprivation. The District Court correctly found that there were no facts that rise to the level of a constitutional deprivation and that Adams' § 1983 claim therefore failed. Accordingly, the Petition for Writ of Certiorari should be denied. There are no compelling reasons for granting Adams' Petition for Writ of Certiorari. There is no federal question involved and no conflict among decisions between courts that require involvement by the Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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